

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHARON L. THOMPSON,

Defendant-Appellant.

UNPUBLISHED

March 27, 2003

No. 237778

Wayne Circuit Court

LC No. 00-007226-01

Before: O’Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her conviction of kidnapping-child enticement, MCL 750.350, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with kidnapping in connection with removing a two-year-old child from a daycare center at which defendant was formerly employed. The child was found the same day and was returned to the center unharmed.

Defendant raises three issues on appeal. First, that the prosecutor committed misconduct by making certain remarks in her closing argument. Second, that there was an error in the jury instructions. Third, that defendant was not provided effective assistance of counsel at trial. We disagree on all counts.

Regarding the prosecutorial misconduct argument, we first note that this issue is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, where no objection is made at trial, appellate review is limited to whether the alleged misconduct amounted to a plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case. *Id.* The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not

personally attack the credibility of defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). An attack of this type can undermine the presumption of innocence. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991).

In this case, defense counsel suggested that the police investigation in this case was sloppy and incomplete, and therefore should not be relied on by the jury. In rebuttal, the prosecution characterized this argument as a “red herring” and “smoking mirrors [sic]” designed to divert the jury’s attention from the real issue, whether the evidence showed that defendant committed the offense. The prosecutor highlighted the fact that, regardless of the actions by the police, defendant admitted to removing the child from the daycare. Consequently, he prosecutor did not improperly attack defense counsel personally, but instead attacked his argument. *Kennebrew, supra*. The remark was not improper and did not deny defendant a fair trial. *Schutte, supra; People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

Regarding defendant’s claim of improper jury instructions, we note that generally claims of instructional error are reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, defendant failed to object to the instructions at trial; therefore, the issue was not properly preserved for appeal, and our review is limited to whether the jury instructions amounted to plain error affecting defendant’s substantial rights. *Carines, supra*.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Kurr, supra*. [Citations omitted.]

In this case, the trial court instructed the jury on the offense of kidnapping and, at defendant’s request, on the lesser included offense of assault and battery, MCL 750.81. The trial court also instructed the jury that it could consider the aiding and abetting theory in relation to the charge of kidnapping. Defendant argues that the trial court’s failure to instruct the jury that it could consider the aiding and abetting instruction only in conjunction with the principal charge of kidnapping, rather than in conjunction with both the principal charge and the lesser included offense of assault and battery, essentially deprived her of the constitutional right to present a defense. We disagree.

The elements of assault and battery are: (1) that the defendant committed a battery on the complainant, i.e., a forceful, violent, or offensive touching that was intended by the defendant and against the will of the complainant; and (2) that the defendant intended either to commit a battery on the complainant or to make the complainant reasonably fear an immediate battery. CJI2d 17.2. To establish that the defendant aided and abetted a crime, the prosecution must show that: “(1) the crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal

intended its commission at the time he gave aid and encouragement.” *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).

In this case, the evidence did not support an instruction that the jury could consider whether defendant aided and abetted assault and battery. The evidence, including defendant’s own statement, showed defendant picked up the child and carried her from the room, and thus supported a finding that defendant was the principal in the commission of the crime of assault and battery. No evidence showed that defendant gave aid or encouragement to any other person to commit the crime of assault and battery. *Id.* Thus, the trial court did not err by failing to instruct the jury that it could consider whether defendant aided and abetted the offense of assault and battery. *Kurr, supra.*

Lastly, defendant claims that she was denied effective assistance of counsel because trial counsel failed to object to the claimed prosecutorial misconduct and alleged improper jury instruction. “[D]efendant did not preserve this argument for appeal because she did not raise it in her statement of the issues presented.” *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nonetheless, because we found no error with respect to those claims, defendant’s assertion of ineffective assistance of counsel must fail; counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Peter D. O’Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray